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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1010

MRS. J. W. SCHOONOVER,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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INTRODUCTION

The petitioner, Mrs. J. W. Schoonover, has petitioned this Court for a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Kansas entered December 13, 1975, affirming the judgment of the Franklin County District Court.

OPINION BELOW

The opinion of the Kansas Supreme Court is reported at .... Kan. ....., 543 P.2d 881 (1975).

QUESTION PRESENTED

Whether the existence of a contingent fee contract between attorney and client in a criminal case renders defense counsel's representation ineffective as a matter of law under the Sixth and Fourteenth Amendments.

The Opinion of the Kansas Supreme Court Is in Accord With Prevailing Legal Doctrine and Presents No Substantial Constitutional Question Meriting Review by This Court.

Although concluding that the contingent fee contract between counsel and the defendant constituted improper ethical conduct in violation of DR 2-106 of the Code of Professional Responsibility, the Kansas Supreme Court reasoned correctly that the mere existence of such an arrangement did not render defense counsel's representation ineffective as a matter of law under the Fourteenth Amendment. The Court held that counsel's unethical conduct constituted but one factor in the constitutional assessment of the effectiveness of his representation of the defendant and concluded that the totality of the circumstances clearly demonstrated counsel's adequacy as a matter of constitutional law. In rejecting the ironclad per se rule urged by the defendant, the Court's analysis and judgment coincided with the methodology employed by virtually all of the nation's courts in evaluating effectiveness of counsel claims.

The lower federal courts have consistently held that consideration of the adequacy of counsel's representation in a particular case necessitates a review of the totality of the circumstances encompassing counsel's service to his client. *Holnagel* v. *Kropp*, 426 F.2d 777 (6th Cir. 1970); *Harried* v. *United States*, 389 F.2d

281 (D.C. Cir. 1967). One who presses such a claim bears a heavy burden of demonstrating a denial of the constitutional right. *United States* v. *Kelton*, 518 F.2d 531 (8th Cir. 1975); *United States* v. *Baca*, 451 F.2d 1112 (10th Cir. 1971); *Holnagel* v. *Kropp, supra; Harried* v. *United States, supra.*

The per se rule urged by the petitioner departs from the well-established policy of the lower courts in requiring an actual demonstration of prejudice to the defense to sustain an ineffectiveness claim and attempts to divert the Court's inquiry from the essential criterion of analysis, the actual representation afforded the accused by counsel. *U. S. ex rel. Williams* v. *Twomey*, 510 F.2d 634 (7th Cir. 1975). This Court, itself, has indicated its agreement with this approach. *Chambers* v. *Maroney*, 399 U.S. 42 (1970).

The lower federal courts that have confronted analogous conflict of interest claims in the context of an attorney's joint representation of two or more defendants have been consistent in their rejection of a per se approach that would find ineffectiveness from the mere fact of dual representation. *United States* v. *Valenzuela*, 521 F.2d 114 (8th Cir. 1975); *United States* v. *Wayman*, 510 F.2d 1020 (5th Cir. 1975); *United States* v. *Donner*, 497 F.2d 184 (7th Cir. 1974); *United States* v. *Truglio*, 493 F.2d 574 (4th Cir. 1974); *United States* v. *Smith*, 464 F.2d 194 (10th Cir. 1972); *Carlson* v. *Nelson*, 443 F.2d 21 (9th Cir. 1971). Furthermore, in two recent cases where claims of ineffectiveness of counsel were premised upon counsel's violation of ethical canons proscribing certain fee arrangements with the defendant, the courts examined the entire circumstances of the representation in holding that such conduct, in and of itself, is not sufficient to render

counsel's services ineffective. *Ray* v. *Rose*, 392 F. Supp. 601 (W.D. Tenn. 1975); *People* v. *Fuller*, 21 Ill. App.3d 437, 315 N.E.2d 687 (1974).

Throughout the course of this litigation, the petitioner has been totally unable to demonstrate the least semblance of prejudice to her defense from counsel's ethical misconduct. Indeed, the specious nature of the claim is revealed by the fact that petitioner did not challenge in the Kansas Supreme Court the trial court's finding that counsel afforded her effective representation. To the contrary, petitioner admitted that counsel was neither negligent nor inept in the actual presentation of her defense in the trial court. See *Schoonover* v. *State*, ... Kan. ...., ..., 543 P.2d 881, 885 (1975). As the Kansas Supreme Court noted in its opinion, the contingency contract, if anything, motivated counsel in the direction of diligent representation. *Schoonover* v. *State*, *supra*, 543 P.2d at 887. To the extent that petitioner belatedly argues that the contract prevented counsel from instituting plea negotiations, the contention is foreclosed by the unchallenged factual conclusion of the trial court that negotiations were not instituted at the repeated insistence of the petitioner (R. 45). *Schoonover* v. *State*, *supra*, 543 P.2d at 883.

Whether the quality of counsel's representation be gauged by the "farce or mockery" standard, *United States* v. *Stern*, 519 F.2d 521 (9th Cir. 1975), that of "reasonably effective assistance," *Maglaya* v. *Buchkoe*, 515 F.2d 265 (6th Cir. 1975), or by some other criterion, an examination of the entirety of counsel's representation demonstrates that counsel diligently and effectively performed his duties as petitioner's advocate. The petition for certiorari presents

no question of constitutional significance meriting review by this Court, nor does it reveal the Kansas Supreme Court's decision to be in conflict with any prior decision of this Court. Supreme Court Rule 19(1)(a), 28 U.S.C. Instead, the petition adheres to a legal philosophy consistently rejected by the lower courts. Therefore, the writ should not issue to review the opinion and judgment of the Kansas Supreme Court herein.

Respectfully submitted,

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